Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1997

JOHN MAYO,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a criminal defendant entitled to meaningful assistance of counsel during the time for filing a motion for new trial?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the Texas Court of Criminal Appeals, which implicitly held that a criminal defendant is not entitled to meaningful assistance of counsel during the time for filing a motion for new trial.

OPINION BELOW

The unpublished Findings of Fact And Conclusions Of Law of the 263rd District Court of Harris County, Texas were entered on July 25, 1997 (Appendix A). The Court of Criminal Appeals denied habeas corpus relief on September 17, 1997 (Appendix B) and denied rehearing on October 8, 1997 (Appendix C).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

On May 13, 1989, petitioner was charged with aggravated sexual assault and aggravated kidnapping. On March 8, 1991, a jury convicted him and assessed his punishment for aggravated sexual assault at 50 years in prison and a $10,000.00 fine, and for aggravated kidnapping at 20 years in prison and a $10,000.00 fine. On May 7, 1992, the Fourteenth Court of appeals affirmed the conviction in an unpublished opinion. The Court of Criminal Appeals denied discretionary review. *Mayo v. State,* No. 14-91-325-CR (Tex. App. – Houston [14th Dist.] 1992, pet ref'd).

On March 25, 1997, petitioner filed a state habeas corpus application. The district court conducted an evidentiary hearing, and thereafter made findings of fact and conclusions of law and recommended that relief be denied. On September 17, 1997, the Texas Court of Criminal Appeals denied relief without written order on the findings of the district court, and on October 8, 1997, denied rehearing. *Ex parte Mayo,* No. 35,090-01 (Tex. Crim. App. 1997)

REASON FOR GRANTING THE WRIT

PETITIONER WAS CONSTRUCTIVELY DENIED THE ASSISTANCE OF COUNSEL DURING THE TIME FOR FILING A MOTION FOR NEW TRIAL.

The contract between petitioner and his trial counsel, Paul Mewis, provided that Mewis' representation would terminate with the jury's verdict.[1] On March 8, 1991, after the jury convicted and sentenced petitioner, he told Mewis that he wanted to appeal. Because Mewis did not handle appeals, he told petitioner to hire another lawyer.

Mewis took no further action on the case because he assumed that petitioner would hire another lawyer. Mewis did not investigate the grounds for a motion for new trial, such as whether there was jury misconduct or whether any juror had a disqualifying conviction.

Mewis did not move to withdraw as counsel, and was unaware that Texas law required him to continue to represent petitioner on appeal until the court permitted him to withdraw or other counsel substituted in his place. When Mewis had not heard from another lawyer after about three weeks, he went to the jail to determine whether petitioner had hired counsel for the appeal. Petitioner said that he could not afford to do so.

On April 4, 1991, three days before the time expired to file a motion for new trial and notice of appeal, Mewis had petitioner brought to court, file notice of appeal, and sign an affidavit of indigency requesting the appointment of counsel on appeal. On that day, the court appointed

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[1] The recitation of the facts is taken almost verbatim from the state district court's findings of fact (Appendix A).

Will Gray as appellate counsel and mailed him notice of the appointment. Gray did not learn of his appointment until the time had expired to file a motion for new trial.

The 30 day time period to file a motion for new trial is a critical stage of the proceedings under Texas law. *Oldham v. State,* 889 S.W.2d 461 (Tex. App. – Houston [14th Dist.] 1994, pet dism'd); *Cox v. State,* 797 S.W.2d 958 (Tex. App. – Houston [1st Dist.] 1990, no pet); *cf. Trevino v. State,* 565 S.W.2d 938 (Tex. Crim. App. 1978). Retained trial counsel has a duty to protect the defendant's appellate rights until the trial court permits him to withdraw. *Ex parte Axel,* 757 S.W.2d 369 (Tex. Crim. App. 1988). This duty extends to investigating the grounds for a motion for new trial. *Id.* at 373. Where trial counsel believes that his representation has ceased after the trial, and takes no further action to investigate grounds for, or file, a motion for new trial, the defendant is denied the assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution. *Oldham v. State, supra.*

Mewis did not investigate the grounds for a motion for new trial because he did not intend to represent petitioner on appeal. However, Mewis did not file a motion to withdraw, and remained petitioner's attorney of record until three days before the time expired to file the motion. Gray was not notified of his appointment in sufficient time to investigate possible grounds. Accordingly, petitioner was denied any meaningful assistance of counsel during the time to file a motion for new trial, and is entitled to an out-of-time motion for new trial. *Cox v. State, supra; Oldham v. State, supra.*

Jacqueline Clewis Barnes, a juror, had a prior conviction for misdemeanor theft which she had failed to disclose on her juror questionnaire or during the voir dire examination. Because no attorney was representing petitioner during the time to investigate grounds for a motion for new trial, the issue of Barnes' disqualification was not raised in a motion for new trial, the evidence was not developed at a hearing, and the issue was not raised on appeal.

The state habeas court recognized that a juror in a Texas criminal trial is absolutely disqualified, pursuant to article 35.19 of the Texas Code of Criminal Procedure, if she has been convicted of theft. *Frame v. State*, 615 S.W.2d 766 (Tex. Crim. App. 1981). The habeas court found that, had Mewis filed a motion for new trial alleging that Barnes was absolutely disqualified from serving as a juror, the trial court would have been obligated to grant a new trial or the conviction would have been reversed on appeal. *Thomas v. State*, 796 S.W.2d 196 (Tex. Crim. App. 1990); *State v. Holloway*, 886 S.W.2d 482 (Tex. App. – Houston [1st Dist.] 1994, pet ref'd). While petitioner's conviction would have been reversed had this issue been raised on appeal, he was not entitled to relief in a state post-conviction habeas corpus proceeding. *Ex parte Bronson*, 158 Tex. Crim. 133, 254 S.W.2d 117 (1952).

The state habeas court's key legal conclusion was that petitioner "was not denied assistance of counsel during the time for filing a motion for new trial, as Paul Mewis remained attorney of record." This conclusion involved an unreasonable application of clearly established federal law, as determined by the United States

Supreme Court, and was based on an unreasonable determination of the facts in light of the evidence presented. The guarantee that a criminal defendant has a right to counsel on appeal "would be a futile gesture unless it comprehended the right to the effective assistance of counsel." *Evitts v. Lucey*, 469 U.S. 387, 397 (1985). Usually, the determination of ineffective assistance requires a finding that counsel's performance was deficient, resulting in prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984). However, prejudice is presumed when counsel is denied completely, whether actually or constructively. *Penson v. Ohio*, 488 U.S. 75 (1988); *Lombard v. Lynaugh*, 868 F.2d 1475 (5th Cir. 1989).

Mewis did nothing whatsoever following petitioner's conviction to investigate the grounds for, and file, a motion for new trial. Thus, petitioner was constructively denied counsel during this critical stage of the proceedings. *cf. Blankenship v. Johnson*, 118 F.3d 312 (5th Cir. 1997) (defendant constructively denied counsel where state appellate counsel provided no representation during the discretionary review stage); *Lombard v. Lynaugh, supra* (defendant constructively denied counsel where state appellate counsel failed to brief any issues on appeal). Therefore, petitioner need not demonstrate prejudice to obtain relief.[2] He is entitled to file an out-of-time motion for new trial with the assistance of competent counsel.

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[2] In the event that petitioner need demonstrate prejudice, the state habeas court found that, had counsel filed a motion for new trial alleging that Barnes was absolutely disqualified from serving as a juror, the trial court would have been obligated to grant a new trial or the conviction would have been reversed on appeal.

CONCLUSION

Petitioner requests that his Court grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

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Findings of Fact and Conclusions of Law of the 263rd District Court of Harris County, Texas 1a

Order of the Court of Criminal Appeals denying habeas corpus relief 7a

Order of the Court of Criminal Appeals denying rehearing 8a

No. 530604-A

Ex Parte	§	IN THE 263RD
JOHN MAYO	§	DISTRICT COURT
	§	
Applicant	§	OF
	§	HARRIS COUNTY, TEXAS
	§	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Having reviewed the application for writ of habeas corpus (including the attached exhibits and affidavits); the respondent's answer; the testimony at the evidentiary hearing held on July 24, 1997, and the official court documents, the Court makes the following findings of fact and conclusions of law:

1. Jacqueline Clewis Barnes, the first veniremember on the jury panel, represented on her juror questionnaire that she had never been accused in a criminal case.

2. Before the veniremembers were brought to the courtroom, the presiding judge in the central jury room asked whether they had ever been convicted of any felony or theft. Barnes either responded in the negative or remained silent; otherwise, she would have not accompanied the panel to the courtroom.

3. Neither the prosecutor nor defense counsel, Paul Mewis, asked the veniremembers whether they had been convicted of any felony or theft, in reliance on the answers

in the jury questionnaires and the knowledge that the veniremembers had already been qualified on this question in the central jury room.

4. Barnes served as juror at trial.

5. At the time of trial, Barnes had a final conviction for misdemeanor theft. On November 9, 1977, she pled guilty to theft in Cause No. 500358 in County Criminal Court at Law Number 2 of Harris County, Texas; her punishment was assessed at three days in jail and a fine of $200.00.

6. Barnes' prior conviction was discoverable as a public record in the office of the Harris County District Clerk.

7. During the trial, neither the applicant, Mewis, nor co-counsel, Cynthia Henley, knew that Barnes had a prior theft conviction.

8. Had Barnes disclosed her conviction during voir dire examination, Mewis would have challenged her for cause, as she was absolutely disqualified from jury service because of the theft conviction.

9. On March 8, 1991, the jury convicted the applicant and sentenced him to 50 years for aggravated sexual assault and 20 years for aggravated kidnapping.

10. Mewis contract with applicant provided that Mewis' representation would terminate with the jury's verdict.

11. On March 8, 1991, after sentencing, the applicant told Mewis that he wanted to

appeal. Because Mewis did not handle appeals, he told the applicant to hire another lawyer.

12. Mewis took no further action on the case because he assumed that the applicant would hire another lawyer. Mewis did not investigate whether there was jury misconduct nor did he check the local criminal records of the jurors. Mewis did not investigate the issues for a motion for new trial nor did he file a motion for new trial. Neither did Henley, as she was hired only to assist Mewis during the trial.

13. Mewis did not move to withdraw as counsel because he was unaware that the law required him to continue to represent applicant following the conviction until such time as the court permitted him to withdraw or other counsel substituted in his place.

14. When Mewis had not heard from another lawyer after about three weeks, in his capacity as applicant's counsel, he met with the applicant in jail to determine whether the applicant had hired counsel for the appeal. Applicant said that he could not afford to do so.

15. On April 4, 1991, three days before the time expired to file a motion for new trial and notice of appeal, Mewis had the applicant brought to court, file notice of appeal, and sign an affidavit of indigency requesting the appointment of counsel on appeal.

16. On April 4, 1991, the court appointed Will Gray as appellate counsel and mailed him

notice of the appointment. Gray did not learn of his appointment until the time had expired to file a motion for new trial.

17. Because no attorney discovered Barnes' theft conviction during the time for filing a motion for new trial, the issue of her disqualification was not raised in a motion for new trial, the evidence was not developed at a hearing, and the issue was not raised on appeal.

18. A juror is absolutely disqualified if she has been convicted of theft. TEX. CODE CRIM. PROC. ANN. art. 35.19 (1989); *Frame v. State*, 615 S.W.2d 766 (Tex. Crim. App. 1981)

19. Had counsel filed a motion for new trial alleging that Barnes was absolutely disqualified from serving as a juror, the trial court would have been obligated to grant a new trial or the conviction would have reversed on appeal. *Thomas v. State*, 796 S.W.2d 196 (Tex. Crim. App. 1990); *State v. Holloway*, 886 S.W.2d 482 (Tex. App. – Houston [1st Dist.] 1994, pet. ref'd).

20. While the applicant would have been entitled to relief had this issue been raised on direct appeal, he is not entitled to relief on post-conviction writ of habeas corpus. *Ex parte Bronson*, 158 Tex. Crim. 133, 864 S.W.2d 117 (1952); *Thomas v. State*, 796 S.W.2d 196, 199 (Tex. Crim. App. 1990).

21. The applicant was not denied assistance of counsel during the time for filing a motion for new trial, as Paul Mewis remained attorney of record.

22. The Court recommends that habeas corpus relief be denied.

ORDER

THE CLERK IS ORDERED to prepare a transcript of all papers in Cause Number 530604-A and transmit them to the Court of Criminal Appeals, as provided by TEX. CODE CRIM. PROC. ANN. art. 11.07 (Vernon Supp. 1997). The transcript shall include certified copies of the following documents:

A. the application for writ of habeas corpus, including any attached exhibits and affidavits;

B. the respondent's Answer;

C. the Findings of Fact, Conclusions of Law and Order;

D. the applicant's Objections to the Findings of Fact, Conclusions of Law and Order;

E. the respondent's reply to the applicant's objections to the Findings of Fact, Conclusions of Law and Order (if any);

F. the transcript and statement of facts of the voir dire examination in Cause Number 530604;

G. the statement of facts from the evidentiary hearing in Cause Number 530604-A;

THE CLERK is further ORDERED to send a copy of this order to the applicant, his counsel and to the respondent.

Signed on this 25th day of July, 1997.

/s/ Woody Densen
WOODY DENSEN,
Presiding Judge
263rd District Court of
Harris County, Texas

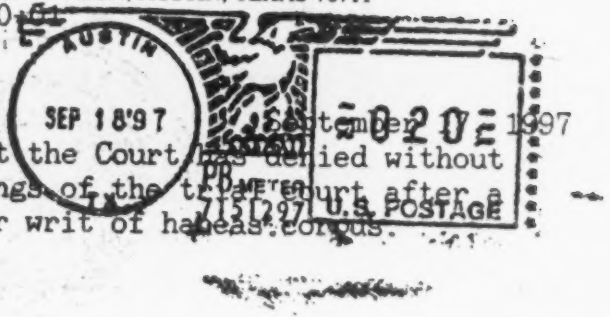
APPROVED AS TO FORM

/s/ Randy Schaffer
Randy Schaffer,
Counsel for Applicant

/s/ Ernest Davila
Ernest Davila
Counsel for
Respondent

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

RE: Writ No. 35,090-01
STYLE: John Mayo
TRIAL COURT NO: 530604-A



September 17, 1997

This is to advise that the Court has denied without written order on the findings of the trial court after a hearing the application for writ of habeas corpus.

Troy C. Bennett, Clerk

RANDY SCHAFFER
1301 MCKINNEY
SUITE 3100
HOUSTON TX 77010

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BEST AVAILABLE COPY

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

RE: Writ No. 35,090-01
STYLE: John Mayo
COURT NO: 530604-A

October 8, 1997

This is to advise that the Court has denied without written order motion for reconsideration.

Troy C. Bennett, Jr., Clerk

RANDY SCHAFFER
1301 MCKINNEY
SUITE 3100
HOUSTON TX 77010

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